FILED
JUN 21 1978
MICHAEL RODAK, JR., CLERK

In the

Supreme Court of the United States

October Term, 1977

No. 77-1812

In the Matter of
HARTFORD TEXTILE CORPORATION,
OXFORD CHEMICALS, INC.
WELLINGTON PRINT WORKS, INC.,

Debtors.

ROSE SHUFFMAN, As Executrix of
the Estate of OSCAR SHUFFMAN, Deceased,

Petitioner,

—against—

HARTFORD TEXTILE CORPORATION,
OXFORD CHEMICALS, INC.
WELLINGTON PRINT WORKS, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Printinghouse Press – Bar Ass'n Steno Serv. (Appeals Section) 212-687-0384

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner prays that a writ of certiorari issue to review the "CORRECTED" Order of the United States Court of Appeals for the Second Circuit, dated May 9, 1978, which denied, without prejudice to apply to Judge Brieant for whatever relief is appro-

priate, Petitioner's Motion to Mandate Jurisdiction Back to the District Court to Allow It to Rule on Motion to Rehear and Reargue its Order Dated February 22, 1978, affirming Orders of the Bankruptcy Court which Reargument Motion the District Court Judge determined to grant and thought he had granted.

OPINIONS BELOW

The United States Court of Appeals for the Second Circuit wrote no opinion in denying without prejudice the motion to mandate jurisdiction back to the District Court of the petitioner herein. The "CORRECTED" Order is printed at page 1a of the Appendix hereto.

The District Court Order of February 22, 1978, for which the appeal to the United States Court of Appeals Docket No. 78-5024 is still pending is printed at page 3a of the Appendix hereto.

The District Court Order entered upon the Motion to Rehear and Reargue, dated April 17, 1978, vacating as improvidently granted, its determination to hear reargument and subsequent denial without prejudice to such action as the parties deem appropriate upon appeal is printed at 5a of the Appendix herein.

On June 8, 1978, the Hon. Charles L. Brieant entertained oral argument on a Motion to Rehear and Reargue his February 22, 1978 Memorandum and Order pursuant to the Court of Appeals "CORRECTED" Order.

Contrary to the representations made by Appellees' counsel to the Court of Appeals that the April 17, 1978 District Court Order was entered based upon the merits, Judge Brieant stated that he denied the motion without prejudice:

> THE COURT: "In view of the pending appeal. I never reached the merits of the reargument motion. You see, any lawyer would know you can't be appealing and rearguing at the same time."

On June 12, 1978, the District Court Judge entered an Order on Petitioner's second Motion for Rehearing and Reargument, made pursuant to the Court of Appeals May 9, 1978 "CORRECTED" Order. The District Judge, in denying the motion because of the imminent hearing in the Court of Appeals and for want of any express power mandated in the May 9, 1978 "CORRECTED" Order, stated:

> "Under the circumstances, it is not clear what relief, if any, could be regarded as "appropriate", nor is it clear what was intended by that portion of the order of the Court of Appeals docketed May 9, 1978, which denied the motion to remand 'without prejudice to apply to [the district court] for whatever relief is appropriate'"

The entire June 12, 1978 District Court Order is reprinted at page 6A of the Appendix herein. Despite the District Court Judge's request for a transcript of the hearing before the Court of Appeals on May 9, 1978, in order to attempt to understand the apparent contradictory holdings in allowing the Petitioner to reapply to the District Court for whatever relief was 'appropriate', yet refusing to stay the proceedings or to grant the power to grant relief, District Judge Brieant entered the June 12, 1978 Order without hearing the Court of Appeals' tape as that portion of the tape containing the Judges' statements is incredibly garbled and unintelligible.

The Order and Amended Order, and the Opinions of the Bankruptcy Judge are not included in the Appendix hereto and are unnecessary to the issue on this appeal.

JURISDICTION

The "CORRECTED" Order of the United States Court of Appeals for the Second Circuit dated May 9, 1978 was docketed in the Court of Appeals on May 9, 1978.

A Motion for Rehearing and Reargument of the Order dated May 9, 1978 by the Court of Appeals in Banc has not yet been scheduled for a hearing. The argument upon the appeal is tentatively scheduled for the week of June 19, 1978.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. section 1254.

An immediate determination of the questions presented is requested pursuant to Rule 20 of the Rules of the Supreme Court of the United States.

FEDERAL RULES OF APPELLATE PROCEDURE INVOLVED

Rule 3 of the Federal Rules of Appellate Procedure states:

> (a) Filing the Notice of Appeal. An appeal permitted by law as of right from a district court to a court of appeals shall be taken by filing a notice of appeal with the clerk of the district court within the time allowed by Rule 4. Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the court of appeals deems appropriate, which may include dismissal of the appeal. Appeals by permission under 28 U.S.C. §1292(b) and appeals by

allowance in bankruptcy shall be taken in the manner prescribed by Rule 5 and Rule 6 respectively.

(b) Joint or Consolidated Appeals. If two or more persons are entitled to appeal from a judgment or order of a district court and their interests are such as to make joinder practicable, they may file a joint notice of appeal, or may join in appeal after filing separate timely notices of Appeal, and they may thereafter proceed on appeal as a single appellant. Appeals may be consolidated by order of the court of appeals upon its own motion or upon motion of a party, or by stipulation of the parties to the several appeals.

(c) Content of the Notice of Appeal. The notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment, order or part thereof appealed from; and shall name the court to which the appeal is taken. Form 1 in the Appendix of Forms is a suggested form of a notice of appeal.

(d) Service of the Notice of Appeal. The clerk of the district court shall serve notice of the filing of a notice of appeal by mailing a copy thereof to counsel of record of each party other than the appellant, or, if a party is not represented by counsel, to the party at his last known address; and in criminal cases, habeas corpus proceedings, or proceedings under 28 U.S.C. §2255, the clerk shall mail a copy of the notice of appeal and of the docket entries to the clerk of the court of

appeals named in the notice. When an appeal is taken by a defendant in a criminal case, the clerk shall also serve a copy of the notice of appeal upon him, either by personal service or by mail addressed to him. The clerk shall note on each copy served the date on which the notice of appeal was filed. Failure of the clerk to serve notice shall not affect the validity of the appeal. Service shall be sufficient notwithstanding the death of a party or his counsel. The clerk shall note in the docket the names of the parties to whom he mails copies, with the date of mailing.

Rule 4 of the Federal Rules of Appellate Procedure states:

(a) Appeals in Civil Cases. In a civil case (including a civil action which involves an admiralty or maritime claim and a proceeding in bankruptcy or a controversy arising therein) in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days of the date of the entry of the judgment or order appealed from; but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days of such entry. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days of the date on which the first notice of appeal was

filed, or within the time otherwise prescribed by this subdivision, whichever period last expires.

The running of the time for filing a notice of appeal is terminated as to all parties by a timely motion filed in the district court by any party pursuant to the Federal Rules of Civil Procedure hereafter enumerated in this sentence, and the full time for appeal fixed by this subdivision commences to run and is to be computed from the entry of any of the following orders made upon a timely motion under such rules: (1) granting or denying a motion for judgment under Rule 50(b); (2) granting or denying a motion under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (3) granting or denying a motion under Rule 59 to alter or amend the judgment; (4) denying a motion for a new trial under Rule 59. A judgment or order is entered within the meaning of this subdivision when it is entered in the civil docket.

Upon a showing of excusable neglect, the district court may extend the time for filing the notice of appeal by any party for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this subdivision. Such an extension may be granted before or after the time otherwise prescribed by this subdivision has expired; but if a request for an extension is made after such time has expired, it shall

be made by motion with such notice as the court shall deem appropriate.

(b) Appeals in Criminal Cases. In a criminal case the notice of appeal by a defendant shall be filed in the district court within 10 days after the entry of the judgment or order appealed from. A notice of appeal filed after the announcement of a decision, sentence or order but before entry of the judgment or order shall be treated as filed after such entry and on the day thereof. If a timely motion in arrest of judgment or for a new trial on any ground other than newly discovered evidence has been made, an appeal from a judgment of conviction may be taken within 10 days after the entry of an order denying the motion. A motion for a new trial based on the ground of newly discovered evidence will similarly extend the time for appeal from a judgment of conviction if the motion is made before or within 10 days after entry of the judgment. When an appeal by the government is authorized by statute, the notice of appeal shall be filed in the district court within 30 days after the entry of the judgment or order appealed from. A judgment or order is entered within the meaning of this subdivision when it is entered in the criminal docket. Upon a showing of excusable neglect the district court may, before or after the time has expired, with or without motion and notice, extend the time for filing a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this subdivision.

QUESTIONS PRESENTED

1. Did the United States Court of Appeals for the Second Circuit abuse its discretion in denying petitioner's Motion to Mandate Jurisdiction Back to the District Court to Allow it to Rule on a Motion to Rehear and Reargue its Order of February 22, 1978, which motion the District Court determined to grant five days after the Notice of Appeal was filed?

2. Did the United States Court of Appeals err in recognizing as a valid Order the April 17, 1978 Order of the District Court Judge, vacating, as improvidently granted, its determination to hear reargument, as the reason for denying the Motion to Mandate Jurisdiction Back to the District Court, and did the recognition of that Order entered after the Appeal was docketed establish disorderly procedure in United States Courts?

STATEMENT OF THE CASE

A. The Facts

Prior to the filing of the bankruptcy petition, Oscar Shuffman entered into a written agreement with Hartford Textile Corporation ("the debtors"). The agreement ("the agreement") states:

> "Reference is made to our orders #8635 and #8637, which you have submitted to Rudd Plastic Fabrics Corp. and which have been accepted by Rudd. We will pay to you or your designee a commission of one (1 cent) cent per pound on our purchases from

> Rudd under said orders provided all assortments ordered under said contract are furnished by Rudd, as it is not intended that Rudd may select the most profitable items for delivery and reject the less profitable items.
>
> It is understood that if for any reason we do not call for delivery of the full quantity ordered, or if for any reason Rudd fails to deliver any part of said orders, you are not to receive commission on the undelivered quantities, and that you are to be compensated only on the delivered and accepted quantities."

Approximately the same time, Shuffman entered into a separate agreement with Rudd Plastic Fabrics Corp. ("Rudd") wherein he was to obtain a sales commission from Rudd in connection with all purchases made by the debtors from Rudd for the following five (5) years.

Shortly thereafter, Rudd notified the debtors that it would not honor its agreements with the debtors unless it was excused from delivering a certain yield of material called for in the purchase order agreements which it had accepted.

Meetings among Rudd, the debtors, Shuffman and their respective counsel in early October, 1971, resulted in a reaffirmation by Rudd of its entire commitment to the debtors and its obligation to Shuffman.

In Approximately November, 1971, Rudd started the shipments to the debtors under

the purchase orders. Rudd, however, refused to honor its contract with Shuffman, while continuing to supply the debtors.

Thereafter, on February 22, 1972, Shuffman commenced an action in the State Supreme Court against Rudd for violation of the contract. In settling that action, Shuffman reduced his remuneration pursuant to his contract with Rudd in consideration of Rudd's agreement to fulfill its obligations to the debtors pursuant to Rudd's contract with the debtors.

When the bankruptcy petition was filed, no mention was made of the Shuffman-debtors agreement. However, the schedule of Executory Contracts did list the two (2) purchase orders referred to in the agreement.

Debtors-in possession's counsel threatened suit to enforce the two agreements and for damages for Rudd's pre-petition breach in continually failing to deliver the lighter yield of material Shuffman had taken a cut in commission on, resulting in a Court-ordered modification of the two purchase orders. A simultaneous Order allowed the debtors to make letter of credit purchases of the material Rudd was excused from delivering under the modification. Shuffman was barred from the negotiations and was not given notice of the Court's Orders, which made no reference to him or his rights.

While the application to the Court for confirmation of the modification of the two (2) purchase orders is devoid of any mention of the agreement, the debtors before and after confirmation of the modification of the two (2) purchase orders continued payment to Shuffman, pursuant to the agreement. Such payment continued up to confirmation of the plan of arrangement, despite debtors' representation in its application for judicial confirmation that the only payments thereunder would be to Rudd for the cost of materials to be used during the arrangement.

Subsequent to the modification of the purchase orders, and before the confirmation of the plan of arrangement, Oscar Shuffman filed a pro se proof of claim in the sum of $80,000.00 for work, labor and services, pursuant to contract, believing that to represent the unpaid amount of commission on both pre-petition and post-petition deliveries by Rudd to the debtors.

The debtors filed an objection to Shuffman's claim and sought to take his deposition. However, as a result of Shuffman's ill health, the taking of his deposition was deferred.

Shuffman died before his deposition could be taken; but settlement negotiations ensued with his Estate, at which time the objection to Shuffman's claim was withdrawn. When such negotiations proved fruitless, the debtors moved to reinstate the objection in the amount of $1,232.87, as a general unsecured claim, based upon the books and records of Hartford, one of the debtors.

The Estate cross-moved to amend the claim for the purpose of treating the major portion thereof as an administrative expense entitlted to priority, for payment of the administrative expense, and to amend the compromise order.

B. Proceedings In The Bankruptcy Court

The Bankruptcy Court granted the debtors' motion to reinstate its objection on December 20, 1976, and simultaneously ordered an immediate hearing on the pre-petition liability. On June 1, 1977 the

Bankruptcy Judge held that the claim be reduced to $432.67, as a general unsecured claim, based upon the testimony of Reuben Fox, debtors' Comptroller, that a 64(a)(2) payment had been made to Shuffman pursuant to Court Order shortly after the petitions were filed, based upon entries in the books of Oxford Chemicals, Inc., another one of the debtors.

The cross-motion of the Estate was denied substantially because the Court characterized the compromise agreement as a new agreement and a cancellation of the purchase orders referred to in the debtors' agreement with Shuffman which he found had terminated pre-petition. The Court further held that there could be no post-petition liability in the absence of a post-petition contract and, assuming arguendo, even if there had been a post-petition agreement, the amendment to the claim was time-barred.

The Estate then moved to amend the findings, amend the decision, and make additional findings. The Court granted reargument; but adhered to its original decision. However, it did amend the findings to include a statement that there was a post-petition agreement between Shuffman and the debtors, and ordered the outstanding balance under the alleged post-petition agreement, covering material received and accepted by the debtors before and after confirmation and discharge, to be paid.

The Estate then moved for rehearing and reconsideration and the Bankruptcy Judge denied the motion, and reaffirmed his prior orders.

C. Proceedings in the District Court

The Estate appealed to the United States District Court for the Soutern District of New York. Oral argument was heard on February 7, 1978, and on February 22, 1978, District Court Judge Charles L. Brieant entered an Order affirming the Orders of the Bankruptcy Court, and denying the appeal in all respects.

The February 22, 1978 Order of the Hon. Charles L. Brieant affirming the Orders of Bankruptcy Judge Babitt, held that:

(a) The Bankruptcy Judge was correct on the facts;

(b) The Bankruptcy Judge was correct on the law;

(c) The President of the debtors-in-possession had apparently improperly entered into an executory contract with appellant's deceased husband, which was allowed to be honored during the period of arrangement by the Bankruptcy Court's Amended Order;

(d) That the agreements between the debtors and Rudd, and the debtors and Shuffman, were not executory because they all terminated pre-filing of the petitions, i.e., prior to July 3, 1973;

(e) That Shuffman was excluded from the negotiations leading to the November 12, 1973 Order approving the compromise between the debtors-in-possession and Rudd, although Shuffman has been or will be paid

commissions under the compromise for material received and accepted during the Chapter XI;

(f) That those dollar for dollar payments to Shuffman for merchandise received and accepted post-confirmation of the plan of arrangement are authorized under the holding in Denton & Co. v. Induction Htg. Corp., 178 F.2d 841 (2d Cir., 1949), which provides for per centage payments under the plan to pre-petition creditors; and

(g) Petitioner's counsel was to be severely criticized for contumely made against the Bankruptcy Judge and appellees' counsel which found no support in the Record.

On March 28, 1978, the Honorable Charles L. Brieant entertained oral argument on Petitioner's Motion to Rehear and Reargue his Order dated February 22, 1978. During the course of oral argument the Court was advised that a Notice of Appeal to the Court of Appeals had been filed. The Notice was filed on March 23, 1978, the next to the last day allowed therefore.

The misapprehension of relevant facts and misapplication of controlling principles of law advanced upon reargument concerned the prior Order of Bankruptcy Judge Babitt dated November 12, 1973, obtained in response to an Application signed and submitted by the President of the debtors on November 2, 1973, and containing as its Exhibit "A" a compromise agreement resolving the dispute between the debtors and Rudd signed by the President of the debtors and the Vice President of Rudd, and containing, as its first recital, stipulated and agreed

facts, to wit:

> "WHEREAS, RUDD and HARTFORD are parties to two agreements, each dated September 13, 1971; and
>
> WHEREAS, a dispute exists between HARTFORD and RUDD concerning said agreements; . . . "

Paragraph 8 of the Exhibit "A" continues:

> ". . . Notwithstanding anything to the contrary, however, if either party willfully fails to perform any of its duties or obligations under the terms of this agreement as determined by Paragraph 7, (arbitration) of this agreement, then the defaulting party is not to be released from any duties or liabilities under any prior agreements with HARTFORD, including, without limitation, the two agreements referred to in the first recital of this agreement."

Further, in his June 1, 1977 Opinion Bankruptcy Judge Babitt found that the two (2) agreements referred to in his November 12, 1973 Order, which were in effect at least until the signing of the Order, had terminated prior to the filing of the Chapter XI's on July 3, 1973, fully four months before he signed the Order.

Despite limiting testimony to pre-petition indebtedness at the hearing held on December 20, 1976, and holding that events post-petition were a question of law, not fact, Judge Babitt amended his post-petition findings of fact on June 28, 1977,

and signed an Amended Order on August 26, 1977, affirming the changes in post-petition findings of fact in his July 20, 1977 Order and its underlying June 1, 1977 Opinion.

On September 28, 1977, the Bankruptcy Judge entered an Order denying the Estate's Motion for Rehearing and Reconsideration, after argument, and otherwise affirmed his two (2) prior Orders, despite the knowledge that his findings of Fact and Conclusion of Law, and his amended findings and conclusions completely disregarded, and were contrary to, the stipulated and agreed facts which served as the basis for the November 12, 1973 Order, all made without a hearing.

Petitioner's counsel also argued that the United States Attorney for the Southern District of New York was obstructing justice and attempting to cover up the criminal conspiracy to defraud the petitioner in order to protect the respondents, their counsel, the Bankruptcy Judge, Rudd and its counsel from their participation in the conspiracy.

At the close of the hearing the District Court Judge marked the motion fully submitted and decision reserved. Although not specifically stated, the Honorable Charles L. Brieant had granted reargument, although no Order to that effect was entered.

D. Proceedings in the Court of Appeals

On April 3, 1978, the Appeal was docketed in the Court of Appeals on the last day allowed therefore. Petitioner's counsel sought advice from the District Court as to the status of the motion to rehear and reargue in the hopes that jurisdiction could

be revested in that forum so that it could rule on the motion.

The District Judge apparently under the belief that the Appeal was taken after he had determined to grant reargument, entered the April 17, 1978 Order vacating, as improvidently granted, the determination to hear reargument, and denied petitioner's motion without prejudice to such action as the parties deemed appropriate upon appeal.

Petitioner's counsel, believing the District Court lacked jurisdiction to enter such an Order,(1) moved for an Order in the Court of Appeals to Mandate Jurisdiction Back to the District Court to Allow it to Rule on the Motion to Rehear and Reargue.

On May 9, 1978, in a decision from the bench, the Court of Appeals at first denied the motion without prejudice to reapply to the District Court once again, in view of the April 17, 1978 Order which it interpreted as validly entered. However, the Court then reversed its position and simply denied the motion in an Order entered that day.

On May 17, 1978, a "CORRECTED" Order was received by petitioner's counsel, denying without prejuedice to apply to District

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(1) The case of Lloyd v. Lawrence, (D.C. S.D.-Tex., 1973) 60 F.R.D. 116, used by the Administrative Director of United States Courts was cited as authority.

Judge Brieant for whatever relief was appropriate, the Motion for Order Mandating Jurisdiction Back to the District Court. The oral application for a stay of the appeal was again denied.

REASONS FOR GRANTING THE WRIT PRIOR TO A FINAL ORDER OF THE COURT OF APPEALS UPON THE APPEAL

A. The Court of Appeals Has Rendered a Decision in Conflict With Other Courts of Appeals on the Same Matter, Has Sanctioned and Established Disorderly Procedure in United States Courts, And By So Doing, Has So Far Departed From the Accepted and Usual Course of Judicial Proceedings as to Call For An Exercise of the Supreme Court's Power of Supervision

The Court of Appeals for the Second Circuit, in Weis v. Hunna, 312 F.2d 711 (1963), cert. denied, 374 U.S. 583, 83 S.Ct. 1920, 10 L.Ed.2d 1073 (1963), in a decision written by Henry J. Friendly, Circuit Judge, and joined in by Circuit Judges Swan and Waterman, decided that the United States District Court was divested of jurisdiction to grant or deny relief under either F.R.Civ.Proc. 59 or Rule 60(b) after a notice of appeal was filed except with the permission of the Court of Appeals.

That decision had been followed in the District Courts within the Second Circuit, see Rolle v. New York City Housing Authority, 294 F.Supp. 574 (C.S.D.-N.Y. 1969) in an opinion written by then District Court Judge Walter R. Mansfield. The same conclusion regarding jurisdiction pending appeal

has been followed in other Districts, and the Administrative Director of United States Courts circulated a Memorandum to District Court Clerks citing Lloyd v. Lawrence, 60 F.R.D. 116 (D.C.S.D.-Tex, 1973) as outlining orderly procedure in District Courts pending appeal.

The Courts of Appeals in the First Circuit in Peterman v. Indian Motorcycle Company, 216 F.2d 289 (1954), the Fifth Circuit in Lairsey v. Advance Abrasives Company, 542 F.2d 928 (1976), the Third Circuit in Secretary of Banking of Pennsylvania v. Alker, 183 F.2d 429 (1950), the Eighth Circuit in Pioneer Insurance Company v. Gelt 558 F.2d 1303 (1977), the Sixth Circuit in Hogg v. United States, 411 F.2d 578 (1969) as well as the Ninth Circuit in Merritt-Chapman & Scott Corporation v. City of Seattle, Wash., 281 F.2d 896 (1960) have all held that once a Notice of Appeal has been filed, the District Court was without jurisdiction to grant, vacate or modify its decree, save for action which would aid in the appeal.

On May 9, 1978 the Court of Appeals for the Second Circuit refused to mandate jurisdiction back to the District Court to allow it to enter a proper order on the Motion to Rehear and Reargue which it determined to grant on March 28, 1978, thought it had granted despite the knowledge that the Notice of Appeal had been filed, and based its Order on the fact that the District Court Judge had vacated that determination on April 17, 1978, and then denied the motion without prejudice to such actions as the parties deemed appropriate upon appeal.

B. The District Court Lacked the Power to Revoke Its Affirmance of the Bankruptcy Court's Orders Under the "CORRECTED" Order of the Court of Appeals Dated May 9, 1978.

It is well-settled that a judgment entered in violation of concepts of due process of law is void. E.G. Bass v. Hoagland, 172 F.2d 205 (5th Cir.), cert. denied., 338 U.S. 816, 70 S.Ct. 57, 94 L. Ed. 494 (1949). In determining to grant reargument, which is the sound exercise of judicial discretion based upon the merits, the Honorable District Court Judge apparently recognized that the Bankruptcy Judge had committed serious error in making findings regarding post-petition indebtedness, and thereafter in amending those findings, after holding such indebtedness to be a question of law, not fact, and without affording petitioner herein a hearing regarding the post-petition facts and indebtedness, especially since the findings and amended findings were in direct contradiction of stipulated and agreed facts underlying a prior Court Order!

In allowing the Honorable Charles L. Brieant to vacate that determination to grant rehearing and reargument, and thereafter deny the motion without prejudice, and without speaking to the merits in the April 17, 1978 Order, the Court of Appeals on May 9, 1978 has recognized as valid an Order entered after an appeal has been filed and docketed, which does not aid in the appeal and only serves to undermine the appellate process by allowing an acknowledgedly defective Order affirming the Bankruptcy Court Orders to be reviewed upon appeal.

Such action in addition to establishing disorderly procedure, constitutes an abuse of discretion by the Court of Appeals in refusing to honor the District Court Judge's determination to grant reargument. It has also set in motion a merry-go-round whereby petitioner has been ordered to go forward in the Court of Appeals on the February 22, 1978 defective Order of the District Court, has been allowed to go back to District Court in a motion which under the May 9, 1978 "CORRECTED" Order was denied for lack of power and because of the pendency of the appeal, while petitioner still awaits her first hearing on the post-petition indebtedness.

Furthermore, petitioner, if ordered back to square 1 for a hearing on the merits will only have to ask the Bankruptcy Judge to disqualify himself as a result of his improper and apparently unlawful conduct, which may well wind up on the doorsteps of this Honorable Court yet again even before the hearing is held, if in fact petitioner is ever allowed a day in Court.

Petitioner herein has been severely prejudiced by the actions of the Court of Appeals in misreading the District Court's April 17, 1978 Order and by providing for disorderly procedure. The Petitioner has further been prejudiced by the District Court's June 12, 1978 Order indicating its confusion over the Court of Appeals May 9, 1978 "CORRECTED" Order, allowing Petitioner to apply to the District Court for whatever relief is appropriate but refusing to grant the District Court power to grant the appropriate relief.

The deliberate falsification by the Bankruptcy Judge of the stipulated and agreed facts underlying his November 12, 1973 Order,

in finding facts and amending facts without a hearing that directly contradict those stipulated and agreed facts, in order to cover up criminal wrongdoing by a major law firm, and the hiring by that firm of the Assistant United States Attorney in charge of white collar crime while the actions of the law firm and judge were under investigation or review, and the subsequent ratification of those acts by the United States Attorney, the Department of Justice, and a United States District Court Judge, have created a "judicial Watergate" that threatens the integrity of the entire judicial process and requires the immediate intervention of this Court.

The May 9, 1978 "CORRECTED" Order of the Court of Appeals, providing for disorderly procedure by the refusal to remand despite the District Court Judge's determination to grant reargument and acknowledged errors, based upon the deliberate misrepresentation to the Court of Appeals by respondents' counsel, threatens to legitimize corruption and organized crime within the United States Courts. Petitioner stands before this Honorable Court as the victim of a crime, ordered and payed for by the Bankruptcy Court, seeking justice.

Three appeals are pending in the Court of Appeals from the three District Court Orders affirming the Bankruptcy Court's Orders, despite the conclusions of the District Court that the respondents acted improperly, that Rudd committed a tort in conspiring with the respondents while they were in possession in order to defraud the Petitioner, and that the debtor-in possession filed a false document in bankruptcy in furtherance of the conspiracy. In addition, the District Judge affirmed post-

confirmation dollar for dollar commission payments which he said he wouldn't do, under a case calling for percentage payments to prepetition creditors.

Another motion to mandate jurisdiction back to the District Court has been filed in the Court of Appeals, while the Motion to Rehear and Reargue the May 9 "CORRECTED" Order is still pending, but unscheduled, and a third motion to Rehear and Reargue the February 22, 1978 District Court Order has also been filed.

Petitioner believes that the actions of the Bankruptcy Judge and United States Attorney in obstructing justice and attempting to cover up the criminal wrongdoing to defraud the petitioner has resulted in apparent choas in the United States District Court for the Southern District of New York and the Court of Appeals for the Second Circuit, requiring the immediate intervention of the United States Supreme Court under its supervisory power. Unless the bull is taken by the horns, the situation will only get worse.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

June 19, 1978.

Respectfully submitted,

DAVID K. SHUFFMAN
Attorney for Petitioner

APPENDIX

CORRECTED

UNITED STATES COURT OF APPEALS

Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the ninth day of May, one thousand nine hundred and seventy-eight.

In the Matter of
HARTFORD TEXTILE CORPORATION,
OXFORD CHEMICALS, INC.
WELLINGTON PRINT WORKS, INC.

Debtors

ROSE SHUFFMAN, as Executrix of the Estate of OSCAR SHUFFMAN,

Appellant

-against-

HARTFORD TEXTILE CORPORATION,
OXFORD CHEMICALS, INC.,
WELLINGTON PRINT WORKS, INC.

Appellees.

It is hereby ordered that the motion made herein by counsel for the appellant

by notice of motion dated April 26, 1978 to remand this action to the United Sates District Court for the Southern District of New York

be and it hereby is denied without prejudice to apply to Judge Brieant for whatever relief is appropriate.

It is further ordered that the oral application to stay proceedings in this court and to extend the time to appeal from an order of JudgeBrieant be and they hereby are denied.

A. DANIEL FUSARO,
Clerk

by: /s/ Edward Guardaro
Staff Attorney

* * *

HON. STERRY R. WATERMAN

HON. WALTER R. MANSFIELD

HON. JOE INGRAHAM

Circuit Judges

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In the Matter	
-of-	73-B 684-676
HARTFORD TEXTILE CORPORATION, OXFORD CHEMICALS, INC., and WELLINGTON PRINT WORKS, INC.,	MEMORANDUM AND ORDER
Debtors.	

Brieant, J.

The Amended Order of Hon. Roy Babitt, Bankruptcy Judge, in this consolidated proceeding under Chapter XI of the Bankruptcy Act, dated August 26, 1977 is affirmed, substantially for the reasons set forth in the Findings and Conclusions of June 1, 1977, as amended on June 28, 1977, and found in the transcript of the proceedings before the Bankruptcy Judge.

The findings sought to be reviewed are not clearly erroneous. Bkcy. Rule 810. The Bankruptcy Judge has made it clear on the record that his findings and decision do not preclude claims of the personal representative of the late Oscar Shuffman against Rudd Plastic Fabrics Corp., however denominated.

Apparently one Magid, President of Hartford Textile Corporation while a Debtor-in-Possession, entered into an executory contract, improperly, and made partial payment thereunder, all without court approval.

The Bankruptcy Judge's amended findings allowed that contract to be effective during the period of the Chapter XI proceedings. Appellant is not aggrieved by that finding.

The prior agreements were not executory at the time the petitions were filed. Mr. Shuffman had done all he had to do to be entitled to payment on goods when delivered and accepted under the original agreements. These agreements were repudiated by Rudd and Grace even prior to filing.

Under a subsequent settlement with Rudd only, Mr. Shuffman was excluded from negotiations, although, as noted, he has been or will be paid a commission by the Debtor. See Denton & Co. v. Induction Htg. Corp., 178 F.2d 849 (2d Cir. 1949).

The charges of impropriety made against the Bankruptcy Judge and the attorneys for the Debtor find no support in the record. These persons are not deserving of such contumely at the instance of a member of the bar of this Court.

So Ordered.

Date: New York, New Y]rk
February 22, 1978

/s/ Charles L. Brieant
Charles L. Brieant
U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re	73 B 674-676
HARTFORD TEXTILE CORPORATION, OXFORD CHEMICALS, INC., and WELLINGTON PRINT WORKS, INC.,	MEMORANDUM AND ORDER
Debtors.	

Brieant, J.

Based upon two letters to the Court filed herein, dated respectively April 10, 1978 and April 13, 1978, the transcript of proceedings of March 28, 1978 and all prior papers and proceedings herein, it appears that the Court's decision to hear reargument of its Memorandum Decision and Order dated February 22, 1978 was improvident. Such reargument was heard on March 28, 1978 and decision reserved. Since that time the movant has appealed to the Court of Appeals for the Second Circuit.

The Court vacates, as improvidently granted, its determination to hear reargument, and denies the motion without prejudice to such proceedings on appeal as the parties may deem appropriate.

So Ordered.

Dated: New York, New York
April 17, 1978

/s/ Charles L. Brieant
Charles L. Brieant
U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re	
HARTFORD TEXTILE CORPORATION OXFORD CHEMICALS, INC., WELLINGTON PRINT WORKS, INC., Debtors.	73 B 674-676 MEMORANDUM AND ORDER

Brieant, J.

This Court entered a Memorandum decision and Order dated February 22, 1978 in effect affirming an order of Bankruptcy Judge Babitt, from which the Executrix of the Estate of Oscar Shuffman ("Shuffman") had appealed to the district court.

Thereafter, appellant moved for reargument in the district court. Such reargument was heard on March 28, 1978, and decision was reserved. Thereafter, Shuffman appealed to the Court of Appeals for the Second Circuit. On learning of the pendency of the appeal, this Court, by Memorandum and Order dated April 17, 1978, vacated, as improvidently granted, its determination to hear reargument, and denied the motion without prejudice to such proceedings on appeal as the parties might deem appropriate.

Then, by motion dated April 26, 1978, Shuffman moved in the Court of Appeals for an order to remand the matter to the district court. That motion was denied, by an Order docketed May 9, 1978, "without prejudice to apply to Judge Brieant for whatever relief is appropriate." The panel of the Court of Appeals

further ordered that "the oral application to stay proceedings in this Court and to extend the time to appeal from an order of Judge Brieant be and they hereby are denied."

Then Shuffman made another motion in the district court "to have a rehearing and reargument pursuant to the order of the Court of Appeals dated May 9, 1978." That motion, docketed May 19, 1978, came on for hearing before me on June 8, 1978.

All proceedings which took place in the district court were based upon the record of proceedings before Bankruptcy Judge Babitt, and such concessions and representations of uncontested fact made to this Court on the record by the counsel for the respective parties. No evidence was taken by this Court, and no findings of fact or determinations of credibility of witnesses occurred in this district court.

It now appears, the Court of Appeals having specifically denied appellant's oral application to stay proceedings in that Court, that a plenary appeal from the order of the district court of February 22, 1978 will soon be heard by a panel of the Court of Appeals. Indeed, a briefing schedule has already been adopted in that Court.

Under the circumstances, it is not clear what relief, if any, could be regarded as "appropriate," nor is it clear what was intended by that portion of the order of the Court of Appeals docketed May 9, 1978, which denied the motion to remand "without prejudice to apply to [the district court] for whatever relief is appropriate."

Cases cited by appellant as authority for further proceedings at this time in this Court do not stand for the propositions urged. Specifically, appellant relies upon Weiss v. Hunna, 312 F.2d 711 (2d Cir.), cert. denied 374 U.S. 853 (1963). We read that case to hold that once a litigant has filed a notice of appeal the district court is divested of jurisdiction to grant or deny relief under either Rule 59 or Rule 60(b), F.R.Civ.P., except with the express permission of the Court of Appeals. The order docketed in the Court of Appeals dated May 9, 1978 does not seem to grant such express authority to the district court.

There also seems to be no useful purpose which would be served by taking any further steps in the district court at this time. The Court of Appeals has before it all of the proceedings which took place before Bankruptcy Judge Babitt. Counsel for the debtor has asked this Court: "in the interests of justice and in the interests of judicial economy and in the interests of the parties, this matter is now in the Court of Appeals and let the Court of Appeals proceed with the disposition of the appeal." This requested procedure does appear appropriate.

The Clerk of the District Court is hereby directed to forward to the Court of Appeals to be associated with the matters docketed under the pending appeal the transcript of the proceedings before the district court on March 28, 1978 and on June 8, 1978.

In all other respects the relief requested by Shuffman's motion, docketed in this Court on May 19, 1978, is denied in the exercise of discretion as being unnecessary in view of the imminent hearing on the appeal to the Court

of Appeals, and is also denied for want of power. See, Weiss v. Hunna, supra.

So Ordered.

Dated: New York, New York
June 9, 1978

/s/ CHARLES L. BRIEANT
Charles L. Brieant
U.S.D.J.